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HAROLD B. WILLEY, Clerk

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1952

NO. 492 MISC.

AARON ROBINSON,
Petitioner

VS.

STATE OF GEORGIA,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Georgia

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANT OF CERTIORARI AND RESPONSE TO PETITION FOR BAIL WITH SUPPORTING BRIEF

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OPINION BELOW

The opinion of the Supreme Court of Georgia is reported in 209 Ga. ——; 75 S.E. 2d 9.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under §1257 (3), Title 28 U.S.C.

STATUTES INVOLVED

The petitioner does not question the constitutionality of any statute, but seems to contend that the action of officers under valid State statutes denied him a fair trial and offends the guarantees of the Fourteenth Amendment.

STATEMENT

Aaron Robinson, the petitioner, was indicted by the Grand Jury of the Superior Court of DeKalb County, Georgia, for the crime of rape, at the December, 1951 Term of that Court. On arraignment, petitioner entered a plea of not guilty to the indictment, and his trial commenced on September 8, 1952.

On September 12, 1952, the jury returned a verdict of guilty with a recommendation of mercy, and his sentence was fixed at not less than 15 years or more than 20 years in the State Penitentiary.

Petitioner filed a motion for new trial on the general grounds that the verdict was not supported by the evidence, and thereafter by amendment added thirty special grounds to his motion for a new trial. The motion as amended was overruled by the Superior Court of DeKalb County on December 29, 1952, and petitioner proceeded by a bill of exceptions to the Supreme Court of Georgia, which Court affirmed the judgment of the trial court on February 24, 1953, 209 Ga. ——; 75 S.E. 2d 9. Petitioner then filed a motion for rehearing in that Court on March 4, 1953, which was denied on March 10, 1953.

Prior to the return of the remittitur to the Superior Court of DeKalb County, petitioner applied to the Supreme Court of Georgia for a stay order, which was granted on March 13, 1953, allowing the petitioner ninety days within which to petition for certiorari in this Court.

On April 27, 1953, the petition for certiorari was docketed in this Court accompanied by a motion to proceed in forma pauperis; accompanying the petition for certiorari was a petition to this Court for supersedeas bond and bail.

SUMMARY OF ARGUMENT

Respondent contends that the petitioner has failed to raise any substantial Federal question, and that the judgment as affirmed by the Supreme Court of Georgia is based upon adequate and independent non-Federal grounds sufficient to support the judgment.

ARGUMENT AND CITATION OF AUTHORITIES

Petitioner seeks by his petition to raise seven enumerated Federal questions. The respondent's contention, as heretofore stated, is that none of the questions sought to be raised by the petitioner are substantial Federal questions and are all supported by adequate non-Federal grounds sufficient to support the judgment.

In support of this contention, respondent will treat briefly each question sought to be raised by the petitioner. For facility of discussion, questions will not be considered in numerical order as set forth by petitioner, but will be grouped according to the principles of law under which it is insisted by respondent that each act or order complained of will be shown to be supported by adequate non-Federal grounds.

Question No. 1 (Petition, page 7), Question No. 5 (Petition, page 19), and Question No. 6 (Petition, page 23) will first be considered together. In Question No. 1 petitioner avers that he was compelled to appear in a police line-up, handcuffed and attired in clothing similar to that worn by the perpetrator of the crime charged, for the purpose of having the prosecutrix identify her assailant. Petitioner further avers that the other persons appearing in the line-up were not so attired or manacled, and that petitioner was in this manner set apart and distinguished as a person suspected of having committed the offense. In addition,

petitioner insists that the prosecutrix did not identify him as her assailant until he was pointed out by a police officer as being the owner of a red car and the person suspected by the police. Petitioner contends that such a method of identification required him to give incriminating evidence against himself in violation of the rights, privileges, or immunities secured him by the Fourteenth Amendment. Petitioner attempted to present this question for review in the Supreme Court of Georgia as the fifth ground of his motion for new trial. The Supreme Court of Georgia, in the first division of its opinion, refused to consider Ground 5 of petitioner's motion for new trial, along with all other grounds requiring reference to the brief of evidence, which that Court found to consist of 369 pages, containing a tremendous amount of irrelevant matters and in which petitioner had made no bona fide attempt to comply with the requirements of §70-305 of the Code of Georgia of 1933 which requires briefs of evidence on motions for new trial to be condensed and succinct briefs of material portions of the oral testimony, with immaterial questions and answers and parts thereof stricken.

In Questions 5 and 6 of the petition for certiorari, petitioner complains of this refusal of the Supreme Court of Georgia to consider the objections requiring reference to the brief of evidence. It is the contention of respondent that the Supreme Court of Georgia acted within the proper exercise of its authority in refusing to consider the grounds of the motion for new trial requiring reference to the brief of evidence. As stated by Mr. Justice Cardozo in the case of *Snyder vs. Massachusetts*, 291 U.S. 97, 105, a State "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so

doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

In other words, in the language of this Court, "... the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of State regulation and control." *Hardware Dealers Mutual vs. Glidden Company*, 284 U.S. 151, 158.

It is thus respectfully urged that the Supreme Court of Georgia, pursuant to an Act of the General Assembly of Georgia establishing a mode of practice in appellate review, properly refused to consider the questions brought before it without any attempt on the part of petitioner to comply with the established rule of practice.

Furthermore, in respect to Question No. 1 of the petition for certiorari, if the Supreme Court of Georgia had considered the grounds urged in that question, that Court would not have been required to apply the provisions of the Fourteenth Amendment in respect to self-incrimination, since this Court has held, in the case of *Twining vs. New Jersey*, 211 U.S. 78, that the exemption from self-incrimination is not safe-guarded as against State action by the provisions of the Fourteenth Amendment. For these reasons, respondent contends that Questions 1, 5, and 6 of the petition for certiorari present no substantial Federal question and that the acts and rulings therein complained of are supported by adequate non-Federal grounds.

In Question No. 2 petitioner contends that he was deprived of rights, privileges, or immunities secured him by the Fourteenth Amendment by reason of the fact that the trial judge retired to his home in another county while the court was recessed in the evenings,

and by reason of the fact that the Clerk of the Court was not physically present in the courtroom during the entire progress of the trial, although his services were available at all times during the progress of the trial. Here again respondent contends that these questions relate to procedure followed by the trial court and governed and controlled by State law. *Snyder vs. Massachusetts*, supra; *Twining vs. New Jersey*, supra, *Brown vs. Mississippi*, 297 U.S. 278. This question was passed upon by the Supreme Court of Georgia in the second division of its opinion and held not to vitiate the proceedings. It is respectfully insisted that the highest court of Georgia has approved this procedure, and being a matter left to the States and not affecting any fundamental right of the petitioner, the same presents no Federal question for the consideration of this Court.

In Question No. 3, petitioner complains of the refusal of the trial court to admit into evidence for impeachment purposes a certified record of the final conviction of the person having the same name as a material witness for the State, when the witness had denied that he was the person named in the record offered and no proof was submitted by petitioner to show that the witness sought to be impeached was the same person as that named in the record of conviction. The Supreme Court of Georgia, in passing upon this question in the fourth division of its opinion, pointed out that the denial of the witness under oath rebutted the presumption of identity of names and the burden was shifted to the petitioner to prove that the witness was in fact the same person named in the record offered. Respondent respectfully insists under the reasons and authorities set forth above in respect to Question 2 that this is not only a rule of evidence controlled

solely by State law, but a proper rule of evidence in no way repugnant to the Fourteenth Amendment.

In Question No. 4 presented by the petitioner, it is contended that he has been deprived of rights, privileges, or immunities secured by the Fourteenth Amendment by the failure of the trial judge to fully instruct the jury upon the doctrine of the presumption of innocence. Petitioner does not aver, nor does the record disclose, that any request was made to the trial court for a particular charge upon this doctrine of law. The record does disclose, however, that the trial court charged fully and fairly upon this subject (R., page 436). Respondent again insists that this is a matter not touching the fundamental principles of justice guarded by the Fourteenth Amendment, but is a matter of State court procedure and no substantial Federal question is presented.

In Question No. 7 petitioner complains of a variance in the date fixed for the alleged crime between the indictment and the testimony at trial. The trial judge properly instructed the jury that the bare date of the offense was not a material averment of the indictment required to be proved by the State, and that such variance was not fatal. This construction was upheld by the Supreme Court of Georgia in the seventh division of its opinion. Respondent again respectfully insists that this question affects no fundamental principle of justice or any right, privilege, or immunity secured to petitioner by the Fourteenth Amendment, but is supported by adequate non-Federal grounds.

It is the position and contention of the respondent in respect to all questions which petitioner attempts to raise that the same present no substantial Federal question, and that the acts and rulings complained of therein may be sustained on adequate non-Federal

grounds. For this reason, and under the authority in the case of *Williams vs. Kaiser*, 323 U.S. 471, 477, wherein Mr. Justice Douglas stated for the Court that "where the decision of the State court might have been either on a State ground or on a Federal ground and the State ground is sufficient to sustain the judgment, the Court will not undertake to review it," it is insisted that the case at bar should not be reviewed.

CONCLUSION

In light of the foregoing authorities, it is respectfully urged that the petition for certiorari should be denied.

Respectfully submitted,

EUGENE COOK
Attorney General of Georgia

ROY LEATHERS
Solicitor-General
Stone Mountain Judicial Circuit

LAMAR W. SIZEMORE
Assistant Attorney General

W. DAN GREER
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Respondent.

RESPONSE TO PETITION FOR BAIL

Now comes the State of Georgia by her Attorney General, and in response to petitioner's application for bail says:

1.

That petitioner fails to state any claim upon which he is entitled to be admitted to bail by this Honorable Court, either as a matter of law or as a matter of sound judicial discretion.

2.

Respondent denies the allegations made by Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of the petition for bail; further answering respondent denies that any mob or any so-called "Klan" activity existed before, during, or after the trial of the petitioner, or that any such group threatened, intimidated, coerced, or influenced the arrest or trial of the petitioner.

WHEREFORE, respondent prays that the petition for bail be denied.

EUGENE COOK,
The Attorney General of Georgia

GEORGIA, FULTON COUNTY:

Personally appeared before me, the undersigned attesting officer, EUGENE COOK, Attorney General of Georgia, who, on oath, deposes and says that the facts alleged in the foregoing response are true and correct to his best knowledge and belief.

This ..... day of June, 1953.

.....

Sworn to and subscribed before me

this ..... day of June, 1953.

.....

In the

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STATE OF GEORGIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR SUPERSEDEAS BOND AND BAIL

STATEMENT

On April 27, 1953 the petition for certiorari in this case was docketed in this Court praying for a writ of certiorari directed to the Supreme Court of Georgia. At the same time petitioner filed a petition for supersedeas bond and bail, praying that reasonable and sufficient bond be assessed for petitioner in this case to await and abide the final judgment of this Court. Although the petition for bond and bail does not clearly point out the authority of this Court to admit petitioner to bail pending final adjudication of this case, such authority, if it exists at all, must exist as an inherent power of this Court as a judicial body or must stem from Section 3144 of Title 18 of the United States Code, which provides:

> "Whenever the judgment of a State Court in any criminal proceeding is brought to the Supreme Court of the United States for review, the defendant shall not be released from custody until

a final judgment upon such review, or, if the offense be bailable, until a bond with sufficient sureties, in a reasonable sum, is given."

Under this Section it is respectfully urged that this Court is prohibited from releasing the petitioner from custody of State authorities prior to a final judgment unless the offense for which petitioner has been convicted in the State Court be a bailable offense.

Petitioner in this case was convicted in the Superior Court of DeKalb County, Georgia, of the offense of rape, a crime punishable by death under the laws of the State of Georgia, unless the defendant is recommended to mercy by the jury, in which case punishment shall be for not less than one nor more than twenty years confinement in the State penitentiary. (Ga. Code §26-1302.) In this case the sentence imposed was confinement in the penitentiary for a term of not less than fifteen, nor more than twenty years. On appeal the Supreme Court of Georgia affirmed the judgment and sentence of the trial court.

QUESTIONS PRESENTED

1. Is or is not the crime of which petitioner stands convicted by the Courts of Georgia a bailable offense within the meaning of 18 U.S.C. §3144 so as to authorize this court to admit petitioner to bail pending disposition of the cause?

2. Does this Court have inherent power, as a judicial body, to admit petitioner to bail, and it if does have such power, should the Court in the exercise of sound judicial discretion admit the petitioner to bail in this case?

SUMMARY OF ARGUMENT

It is the position of the respondent in this case that said crime is not a bailable offense within the meaning of 18 U.S.C. §3144, and that this Court is, therefore, without authority under said section to admit petitioner to bail prior to a final judgment reversing the decision of the Supreme Court of Georgia for the reasons hereinafter set forth.

It is the further position of the respondent that if this Court possesses inherent power to grant or refuse bail independent of 18 U.S.C. §3144, this Court in the exercise of its sound judicial discretion should deny petitioner's application for bail.

ARGUMENT AND CITATION OF AUTHORITIES

A. This offense is not bailable within the meaning of 18 U.S.C. §3144.

Petitioner was convicted of a crime against the laws of the State of Georgia. (Ga. Code §26-1302) Petitioner was not charged with, tried for, or convicted of any crime against the laws of the United States. Petitioner seeks review in this court of the decision of the Supreme Court of Georgia alleging that the result of that decision in affirming the judgment of the trial court has deprived him of certain constitutionally guaranteed rights due to alleged errors in the conducting of his trial in the Superior Court of DeKalb County. This Court in reviewing the petition for certiorari, and in reviewing the decision of the Supreme Court of Georgia upon grant of the writ of certiorari, would assume jurisdiction, if at all, by virtue of a Federal question properly raised, and would be empowered to decide only the questions of Federal law in issue.

The crime being an offense against the laws of the State, and review in this Court being available to petitioner only as to Federal questions, it is respectfully insisted that the laws of the State of Georgia as to the grant or denial of bail are controlling upon this court and whether or not the offense is bailable within the meaning of 18 U.S.C. §3144 must be determined by State law applicable to the question of bail.

The offense of which petitioner stands convicted is not bailable at this time under the laws of the State of Georgia. Whether or not an offense is bailable under Georgia law must be determined according to the provisions of Section 27-901 of the Code of Georgia of 1933, which provides:

> "Capital offenses are bailable only before a judge of the superior court; and this is, in every case, a matter of sound discretion. All other cases are bailable by the committing court. At no time, either before the commitment court, when indicted, after a motion for a new trial is made, or while a bill of exceptions is pending, shall any person charged with a misdemeanor be refused bail."

The crime of rape is punishable by death or imprisonment in the penitentiary for a term not to exceed twenty years. Since a defendant convicted of rape might be punished by death the offense of rape is classified as a capital felony, and it remains an offense of that degree regardless of whether the death penalty is actually imposed by the jury. Although this question has not been precisely ruled upon by the Appellate Courts of Georgia, this result would appear to be compelled by a parity of reasoning from the decisions of the Supreme Court of Georgia in the cases of *Chandler vs. The State*, 39 Ga. 85 and *Miller vs. The State*, 58 Ga. 200. In those cases the question was whether or

not an offense amounted to a misdemeanor or to a felony when discretion was given the court as to whether felony punishment or misdemeanor punishment would be inflicted, and in which cases the lesser punishment was imposed. The rationale of the Court's opinion in these cases was to the effect that when the prisoner is *liable* to be punished by imprisonment in the penitentiary the offense is felony and this is the criterion in determining the grade of crime even though there may be discretion as to inflicting a lower grade of punishment. Therefore, rape being a capital felony by definition remains a crime of such grade at all times regardless of how the punishment may be softened.

Thus, the crime of rape being a capital offense is by virtue of the provisions of Section 27-901 of the Code of Georgia quoted above bailable only before a Judge of the Superior Court and this is in every case a matter of sound discretion.

Even if the crime of which defendant stands convicted should no longer be considered a capital offense since the death penalty has not been imposed, it remains a crime of the grade of felony and the Courts of Georgia have held felonies after trial and conviction to be bailable by the judges of the Superior Courts in their sound discretion and not as a matter of right as before trial. *Vanderford vs. Brand*, 126 Ga. 67; *Newsome vs. Scott*, 151 Ga. 639, 642; *Johnson vs. Aldredge*, 192 Ga. 209, 211, and cases cited therein.

Thus it will be seen that petitioner in the case at bar is not entitled after conviction to bail as a matter of right regardless of whether the offense be considered a capital felony or a mere felony, but petitioner is entitled to bail only in the sound discretion of the

trial Judge, who has refused to admit this petitioner to bail.

In cases in which the trial Judge is authorized to exercise a sound discretion as to bail, the Supreme Court of Georgia is without power to admit the prisoner to bail and has repeatedly refused to do so unless the trial Judge in denying bail has flagrantly abused his discretion. The test laid down by the Supreme Court of Georgia for determining whether or not the trial Judge has abused his discretion is stated clearly in the case of *Bishop vs. Wilbanks*, 161 Ga. 305, 309.

> "The granting or refusing of bail is a matter within the sound discretion of the court below, and this court will not control that discretion unless it has been flagrantly abused. *Lester vs. State*, 33 Ga. 192. It is insisted in the argument of counsel before this Court that no jury would convict the petitioner upon the evidence in this record; and that, if they should do so, a court would unhesitatingly set the verdict aside. Admitting that this presents the test by which the question as to whether the judge below has abused his discretion or not, we do not feel authorized to disturb the judgment in the case."

Under this test the Supreme Court of Georgia was powerless to admit this petitioner to bail since there was sufficient evidence to convict and such conviction was approved by the trial Judge and the judgment of the trial court affirmed by the Supreme Court of Georgia. It will thus be seen that although the offense for which petitioner now stands convicted was an offense bailable by the trial Judge in his sound discretion both before and after conviction, such offense is no longer bailable under the laws of Georgia by any court of that State since the trial Judge has lost juris-

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diction of this case by virtue of this proceeding and the Supreme Court of Georgia, the only other court of Georgia authorized to admit petitioner to bail, is not empowered to do so by reason of Section 27-901 of the Code of Georgia and its own decision in the case of *Bishop vs. Wilbanks*, supra.

The offense being no longer bailable by the courts of Georgia and this court being bound, as pointed out above, to determine whether an offense is bailable within the meaning of 18 U.S.C. §3144 by applicable State law, it is respectfully insisted that this Court is not authorized and should not assess bond and admit petitioner to bail.

B. If this Court possesses inherent power to grant or refuse bail independent of 18 U.S.C. §3144, this Court in the exercise of sound judicial discretion should deny this petition for bail.

Respondent has been unable to find an authoritative expression of the question of whether or not this Court's power to admit to bail stems solely from power delegated to it by Congress. The opinion expressed by the Court in the case of *Hudson vs. Parker*, 156 U.S. 277, seems to indicate that the power of this Court to grant bail stems from express Acts of Congress, but the dissenting opinion expressed by Mr. Justice Brewer in that case adopts the view that such power is an inherent power of the Court not regulated by the Constitution or by statute. While the *Hudson* case is distinguishable, in that it involved a Federal prisoner convicted in a Federal District Court, respondent has been unable to find any expression of authority on the power of this Court to admit to bail defendants in criminal cases brought up for review from State courts.

If this Court determines that it does have inherent power to admit this petitioner to bail, independent of 18 U.S.C. §3144, respondent urges that this Court should exercise its discretion by refusing bail for the reason that the allegations contained in the petition for bail are herein denied by respondent under oath, insofar as the same relate to the intimidation of the petitioner by any mob, crowd, Ku Klux Klan or other organization before, during or after his trial in any manner so as to threaten petitioner with any injury or harm or to interfere with a fair and impartial trial of the petitioner for the crime of which he was charged. These facts do not appear of record in this case, are herein denied by respondent under oath, and respondent stands ready, willing, and able to disprove all such allegations of this petition.

For either or both of which above reasons, respondent urges that the petition for supersedeas bond and bail should be denied.

Respectfully submitted,

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